SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
DEC 24 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-733

LONG ISLAND LIGHTING COMPANY,

—against— *Petitioner,*

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,

Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

—against— *Petitioner,*

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,

Respondents.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this brief in opposition to the brief of respondents and in further support of their Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The Nature of The Petition

The Petition asks the Court to grant certiorari and to review three clear-cut questions. The Petition is not in any sense an argument of the merits of petitioners' claims, and the sole issue this Court must decide is whether those questions are of sufficient importance to merit review.

Respondents take a different tack. They argue on the merits that the decisions below were correct (Resp. Br. pp. 10, 16-17).* They deny that summary judgment has been granted on a Rule 12(b)(6) motion (Resp. Br. pp. 5-7). They deny that the petition raises any issue involving the conflict among the circuits on the rules for determining antitrust standing (Resp. Br. pp. 14-17). They deny that the Petition raises the question of the propriety of the standing test of the Second Circuit (*Id.*).

Respondents' denials do not make the issues disappear. Argument on the merits of respondents' "factual" defenses does not justify the incorrect dismissals below; the issues raised by this Petition are properly framed and ripe for review.

Petitioners submit this brief solely to correct the most disturbing of respondents' many inaccurate assertions. Respondents have tried to muddle the record, primarily by launching baseless attacks on petitioners' conduct in the Courts below, and accusing petitioners of allegedly "blatantly improper" conduct in this Court on this Petition (Resp. Br. p. 6). They represent to this Court that the Petition is "fast-and-loose", presents "no substantial issues" and "nothing of consequence" (Resp. Br. 5).

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*References to "Resp. Br. p. " are to their brief filed in opposition to this Petition.

These caustic attacks should not divert this Court from the central and very basic issues petitioners raise.

1. The Alleged "Non-Existent" Summary Judgment

The Petition makes plain that, in a practice now common on motions addressed to antitrust standing, the Courts below on a Rule 12(b)(6) motion effectively granted summary judgment dismissing the complaints. Petitioners ask this Court to halt this trend.

Petitioners demonstrate that the Courts below made critical findings of fact on the motive and intent of respondents, none of which is supported by the language of the complaints (*see,* Petition, pp. 17-19). Petitioners do not contend that the District Court erred in not converting the motions to summary judgment. On the contrary, petitioners assert that it was error to grant summary judgment by adopting respondents' reconstruction of the complaints, based on "facts" outside the complaints, without considering documents from respondents' files that petitioners presented on the motion. The "discretionary" exclusion of those documents violated the most basic precepts set down by this Court in *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464 (1962).

Petitioners did not acquiesce in this procedure. Petitioners repeatedly urged the District Court that if there were doubts concerning the pleadings, it should consider the proferred documents. In fact, petitioners' counsel informed the Court that its refusal to consider extrinsic evidence to counter respondents' "factual" arguments was "hobbling me on this argument" (JA 158).*

*References to "JA" are to the Joint Appendix submitted to the Court of Appeals for the Second Circuit.

One issue on this petition is whether the Courts' flat refusal to take cognizance of petitioners' extrinsic evidence, while adopting respondents' factual reconstruction of the complaints, violated the long established *Poller* standard for deciding motions of this type in complex antitrust cases. Petitioners submit that it did.

2. The "Purported Inconsistency" of LILCO's Second Claim

The Second Claim of Long Island Lighting Company (LILCO) expressly incorporates every material factual averment of its First (JA 19). It also adds substantial additional facts and is based on a broader theory. LILCO has never suggested in any court and does not now suggest that the two claims are identical—only that the Second Claim, which is broader, and which it has standing to prosecute, also includes the pleadings of the First.* No "flip-flop" has occurred (*cf.*, Resp. Br. p. 8).

Petitioners objected to the District Court's "identical" treatment of the two claims. Its decision dismissing the Second Claim has been unanimously reversed and is not challenged by respondents. The Court of Appeals found that the District Court's equivocal statement at oral argument of its reason for treating LILCO's Second Claim in this manner (the basis for petitioners' purported acquiescence) was "inaccurate", and found that respondents' counsel could not point to any statement in the record to show that "in the heat of forensic battle in the courtroom [LILCO's counsel] was even aware of the significance *of the Court's misstatement.*" (emphasis added) (A 13)**

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*Indeed, many of the same allegations of direct injury to LILCO which the Court of Appeals found sufficiently "direct" for the Second Claim (A 16) are also pleaded with respect to the First (A 48-49).

**References to "A" are to the Appendix to the Petition.

3. The "Claimed Rewriting" of the Complaints

Once again, respondents attempt to minimize the significance of the Petition, this time by using two quotations out of context. Although it may well be that Libya or Saudi Arabia were targets of the conspiracy, *this is not what the complaints allege.* The complaints allege that pursuant to an ongoing conspiracy, commenced at least 2½ years prior to the boycott, respondents in concert stopped lifting oil, stopped exporting oil, tried to stop others from exporting it and tried to deny any supply to the East Coast of the United States. In short, they imposed a boycot of low sulphur oil destined for petitioners. Regardless of what respondents now claim their motives to have been, the First Claims challenge the particular boycott which caused injury to petitioners (*see*, Petition pp. 4-8).

This was clearly stated on oral argument in the District Court in colloquy surrounded by that quoted by respondents (Resp. Br. p. 11): "If the reason they [respondents] refused to deal with LILCO and CON ED directly was because they wanted to be sure that the Libyan boycott was not broken, then that is an illegal act . . . Whatever they might have done individually, they had no right to do together." (JA 143) (*cf.*, Resp. Br. p. 11)

Furthermore, in petitioners' brief in the Court of Appeals, in the very next paragraph following the one quoted by respondents (Resp. Br. p. 10), petitioners "proclaimed":

> "But *the complaints go on to allege* that the LPG majors jointly refused to deal with LILCO and CON EDISON, first through boycott of NEPCO and then directly after solicitation of offers by the utilities (A 13-4, 16, 36, 39). The oil companies then agreed to and did "chase" the

> "hot oil" to enforce the boycott, and denied transportation to NEPCO." (emphasis added)

Unlike respondents, who themselves "regrettably misrepresent"* the contents of the complaints, petitioners would gladly let the complaints "speak for themselves", for there is no doubt as to which conclusion they compel.

4. The Standing Question

Despite the express recognition by respondents' counsel on oral argument in the District Court that the Second and Ninth Circuits have "diametrically opposed rules", and that the test of directness "leaves something to be desired" (JA 133), in their brief respondents now assert that there is no "substantial question" with respect to standing, just a difference in "rubrics" the circuits employ (Resp. Br. p. 14).

The situation was confused enough when the conflict in the circuits was limited to a choice of either of two tests to determine antitrust standing, tests that have led to cases being "decided contrary to one another on identical states of fact", as respondents' counsel put it in the District Court (JA 133). The Sixth Circuit has now adopted still a third test. Under any application of two of these three tests, these complaints most clearly could not have been dismissed.

Therefore, Petitioners ask this Court to grant certiorari and to articulate an appropriate substantive and procedural standard for deciding the standing issue—a standard that will end the current uncertainty and the haphazard results.

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*It is at best puzzling why respondents characterize the Petition as "a hodgepodge of claimed quotations from excluded materials, misstatements, misleading innuendos and freshly-minted and false accusations . . .", (Resp. Br. p. 5) when the facts in the Petition are correct.

Conclusion

This Petition raises issues of substantial public importance.* Petitioners respectfully ask that the Writ be granted.

December 23, 1975

Respectfully submitted,

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*In this connection, petitioners respectfully refer the Court to the brief of the New York State Public Service Commission filed as *amicus curiae* in support of this Petition.